

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

MICHAEL MCINERNEY,

Petitioner,

vs.

DONALD HELLING, et al.,

Respondents.

Case No. 3:07-CV-00037-LRH-(RAM)

ORDER

Petitioner has submitted an Affidavit (#43), which the Court construes as an application to proceed in forma pauperis on appeal. The Court finds that Petitioner is unable to pay the appellate filing fee.

Petitioner also has submitted an Application for Certificate of Appealability (#40). To appeal the denial of a petition for a writ of habeas corpus, Petitioner must obtain a certificate of appealability, after making a “substantial showing of the denial of a constitutional right.” 28 U.S.C. §2253(c).

Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy §2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.

Slack v. McDaniel, 529 U.S. 473, 484 (2000); see also James v. Giles, 221 F.3d 1074, 1077-79 (9th Cir. 2000).

Before trial, Petitioner was found to be incompetent, was treated, and was then found to be competent. Ground 1 was a claim that trial counsel was ineffective for not moving for a second

1 determination of competency. The Nevada Supreme Court determined that no evidence was before
2 trial counsel that would have led him to conclude that a second competency hearing was necessary.
3 This Court determined that the Nevada Supreme Court's ruling was a reasonable application of
4 clearly-established federal law. In his Application (#40), Petitioner argues, "The court addressed
5 ground one only as a procedural competency claim, but not as a substantive competency claim. This
6 was in error." The Court cited the correct decision of the Supreme Court of the United States for
7 when a trial court would need to determine whether a criminal defendant is competent, Drope v.
8 Missouri, 420 U.S. 162 (1975). Likewise, Strickland v. Washington, 466 U.S. 668 (1984), is the
9 governing decision of the Supreme Court regarding the effectiveness of counsel's assistance. Jurists
10 of reason would not disagree that the state courts identified the correct standards. However, jurists
11 of reason might dispute whether the state courts' applications of those standards were reasonable,
12 and the Court certifies that issue as appealable.

13 The issue regarding Ground 2 is based upon some misunderstandings of the facts. Despite
14 Petitioner's argument to the contrary, counsel's strategy of an intoxication defense was successful,
15 because ultimately Petitioner's conviction for attempted murder was overturned. Despite
16 Petitioner's argument to the contrary, the records from the Mohave County mental health office do
17 not show schizophrenia, but depression and drug abuse. Finally, despite Petitioner's argument to
18 the contrary, the Court is aware of the report from the Lakes Crossing mental health facility that
19 Petitioner needed treatment to become competent. That report occurred after Petitioner's attack
20 upon Edwin Hickman. At pages 6-7, the Court was discussing the Nevada Supreme Court's note
21 that Petitioner had not been diagnosed as schizophrenic before he attacked Hickman, as part of that
22 Court's holding as to why counsel did not investigate and present an insanity defense. Nonetheless,
23 jurists of reason might find this Court's findings debatable, and the Court certifies this issue as
24 appealable.

25 In Ground 3, the Court ruled that the preliminary hearing testimony of Edwin Hickman was
26 admissible at trial because Hickman was cross examined at the preliminary hearing. See Crawford
27 v. Washington, 541 U.S. 36 (2004). Reasonable jurists would not find this conclusion to be
28 debatable.

Ground 4 was a claim that the correction of Petitioner's sentence violated the Double Jeopardy Clause of the Fifth Amendment. The sentence that the state district court first imposed was illegal because it lacked the equal and consecutive sentence for the use of a deadly weapon, as required by Nev. Rev. Stat. § 193.165. The state district court corrected that error during the post-conviction proceedings by adding the required equal and consecutive sentence. This Court determined that a correction of an illegal sentence does not violate the Double Jeopardy Clause, even when the correction results in an increased sentence. See Bozza v. United States, 330 U.S. 160, 166-67 (1947). Reasonable jurists would not find this conclusion to be debatable.

Petitioner takes exception to the Court's statement that it is not concerned with the Nevada Supreme Court's decision in Miranda v. State, 956 P.2d 1377 (Nev. 1998), because the relief that the Nevada Supreme Court granted was based upon the Nevada Constitution. This Court may grant relief "only on the ground that [Petitioner] is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). The interpretation of the Nevada Constitution in Miranda simply is not an issue before this Court. Reasonable jurists would not find this conclusion to be debatable.

IT IS THEREFORE ORDERED that Petitioner's application to proceed in forma pauperis on appeal, which the Court construes from his Affidavit (#43) is **GRANTED**. Petitioner need not pay the appellate filing fee.

IT IS FURTHER ORDERED that Petitioner's Application for Certificate of Appealability (#40) is **GRANTED** in part on the following issues:

1. Whether the Court was correct in its ruling that trial counsel did not provide ineffective assistance by not moving for a second competency hearing before trial; and

2. Whether the Court was correct in its ruling that trial counsel did not provide ineffective assistance by not investigating Petitioner's mental health and psychiatric history at the time of Petitioner's attack upon Edwin Hickman.

DATED this 22nd day of June, 2009.



LARRY R. HICKS
UNITED STATES DISTRICT JUDGE